IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Respondent,	)	
	)	NO. CV 16-657 JP/KBM
v.	)	CR 13-964 JP
	)	
JAY PATRICK MOUNT,	)	
	)	
Defendant-Movant.	)	

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO CORRECT SENTENCE UNDER 28 U.S.C. § 2255

The United States of America hereby responds to Defendant's Motion to Correct his Sentence pursuant to 28 U.S.C. § 2255. Doc. 54. Defendant argues that the Supreme Court's holding in *United States v. Johnson*, 135 S. Ct. 2551 (2015), that the residual clause of the Armed Career Criminal Act of 1984 is unconstitutionally vague, renders his sentence invalid. Because Defendant was not sentenced pursuant to the Armed Career Criminal Act ("ACCA"), Defendant is not entitled to any relief. Additionally, in his plea agreement, Defendant waived his right to collaterally attack his sentence. For the reasons set forth below, the Court should deny Defendant's motion.

I. Background

On February 5, 2014, the Defendant, with the benefit of a Rule 11(c)(1)(C) plea agreement, pled guilty to the one-count indictment, which charged him bank robbery, in violation of 18 U.S.C. § 2113(a). The statutory maximum punishment for each count is not more than 20 years of imprisonment. A presentence report ("PSR") was prepared which calculated Defendant's base offense level as 20. PSR at ¶ 27. His base offense level was increased by two levels pursuant to USSG § 2B3.1(b)(1) because the offense theft from a financial institution. PSR at ¶ 28. His balance offense level was increased by another two points because the Defendant made a death threat during the course of committing the offense. *Id*. at ¶ 29. Next, the PSR determined the Defendant to be a career offender pursuant to USSG § 4B1.1, a designation that raised his offense level to 32. PSR at ¶ 34. His offense level was then decreased by three levels for acceptance of responsibility pursuant to USSG § 3E1.1, making his total offense level 29. PSR at ¶¶ 35-37. This offense level, combined with a criminal history category of VI, resulted in a guideline imprisonment range of 151 to 188 months. PSR at ¶87. The Court accepted the plea agreement, determined that he was a career offender, and sentenced him to the agreed-upon term of 120 months. He now argues that in the wake of *United States v. Johnson*, 135 S. Ct. 2551 (2015), his prior convictions for robbery and attempted kidnapping no longer qualify as "violent felonies" under the career offender provision so, therefore, he must be resentenced. The Court should deny the motion.

II. Argument

A. Defendant Waived Collateral Review of His Sentence In His Plea Agreement.

In his plea agreement, Defendant waived his right to collaterally attack the sentence imposed in this case. Defendant's plea agreement contains the following waiver of appellate rights:

> The defendant is aware that 28 U.S.C. § 1291 and 18 U.S.C. § 3742 afford a defendant the right to appeal a conviction and the sentence imposed. Acknowledging that, the defendant knowingly waives the right to appeal this conviction and any sentence and fine at below the agreed-upon sentence. The Defendant specifically agrees to not to appeal the Court's resolution of any contested sentencing factor in determining the advisory guideline range. In other words, the Defendant waives the right to appeal both the Defendant's conviction and the right to appeal any sentence imposed in this case except to the extent, if any, that the Court may depart or vary upward from the agreed-upon sentence. In addition, the defendant agrees to waive any collateral attack to this conviction and the sentence imposed, including any fine, pursuant to 28 U.S.C. § 2255, except on the issue of counsel's ineffective assistance in negotiating or entering this plea or this waiver.

Cr. Doc. 45 at ¶ 14. Defendant's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 constitutes a collateral attack on the sentence imposed, pursuant to 28 U.S.C. § 2255. Accordingly, Defendant's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 is specifically barred by his plea agreement.

A waiver of the right to bring a collateral attack in a plea agreement is generally enforceable. *United States v. Cockerham*, 237 F.3d 1179, 1181 (10th Cir. 2001). The Tenth Circuit has instructed that waivers of collateral rights are enforceable so long as: (1) the collateral attack falls within the scope of the waiver; (2) the defendant knowingly and voluntarily waived his right to collateral review; and (3) enforcing the waiver would not result in a miscarriage of justice. *See United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam) (reviewing waiver of appellate rights); *see also Cockerham*, 237 F.3d at 1183 (stating that "the constraints which apply to a waiver of the right to direct appeal also apply to a waiver of collateral attack rights.").

Applying the first *Hahn* factor, Defendant's 28 U.S.C. § 2255 claim falls squarely within the scope of his waiver. Defendant's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 plainly constitutes a collateral attack to the sentence imposed as a result of his conviction. In his plea agreement, Defendant specifically agreed to waive any collateral attack to the sentence imposed as a result of his conviction, pursuant to 28 U.S.C. § 2255, except on the issue of ineffective assistance of counsel. ("In addition, the defendant agrees to waive any collateral attack to this conviction and the sentence imposed, including any fine, pursuant to 28 U.S.C. § 2255, except on the issue of counsel's ineffective assistance in negotiating or entering this plea or this waiver.")

Defendant has not raised any claims regarding the knowing and voluntary nature of his appellate waiver. Nevertheless, applying the second *Hahn* factor, Defendant's plea shows that he knowingly and voluntarily waived his appellate rights, including his right to collateral review, except on the issue of ineffective assistance of counsel. In determining whether a defendant entered a plea agreement knowingly and voluntarily, the Court should examine the language of the plea agreement and whether there was an adequate colloquy. *See Hahn*, 359 F.3d at 1325. In waiving his appellate rights, Defendant acknowledged his appellate rights, including his right to bring a collateral attack under 28 U.S.C. § 2255, and agreed to waive any collateral attack to his conviction or the sentence imposed. In addition, Defendant agreed that his plea of guilty wass freely and voluntarily made and not the result of force or threats or of promises apart from those set forth in this plea agreement. Doc. 45 at ¶ 17. Finally in signing his plea agreement, Defendant affirmed the following:

> I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant sentencing guidelines provisions, and of the consequences of entering into this agreement. No promises or inducements have been given to me other than those contained in this agreement. No one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

Id. at p. 9. In addition, Defendant's attorney signed the plea agreement and affirmed the following:

> I am JAY PATRICK MOUNT's attorney. I have carefully discussed every part of this agreement with my client, including potential immigration consequences, if applicable. Further, I have fully advised my client of his rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant sentencing guidelines provisions, and of the consequences of entering into this Agreement. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.

Id.

Defendant's plea colloquy was thorough. *See* Cr. Doc. 43. The Court's minutes from the plea hearing indicate that Defendant was questioned regarding his age, education, physical and mental condition, and whether he was under the influence of alcohol, drugs, or medication. Defendant was advised regarding his constitutional rights, loss of rights, and maximum possible penalties. *Id*. Defendant was questioned regarding whether he had sufficient time to consult with his attorney and if he was satisfied with the attorney's representation. *Id*. It was only after all of these inquiries that the Court found that Defendant fully understood the charges, the terms of the plea, and the consequences of entering into the plea agreement. *Id*. The Court also found that Defendant entered his plea of guilty feely, voluntarily, and intelligently. *Id*. The Court then accepted Defendant's guilty plea. *Id*. Accordingly, it is clear from the plea colloquy that Defendant's waiver of his appellate rights in his plea agreement was a knowing, intelligent, and voluntary act.

Applying the third *Hahn* factor, enforcing Defendant's waiver of appellate rights would not result in a miscarriage of justice. A waiver of post-conviction rights results in a miscarriage of justice and is unenforceable if the defendant can establish one of the following: (1) the district court relied on an impermissible factor such as race; (2) the prisoner's counsel was ineffective concerning the negotiation of the plea agreement; (3) the sentence exceeds the statutory maximum; or (4) the waiver is otherwise unlawful. *Cockerham*, 237 F.3d at 1182 (citations omitted). Defendant has not raised any of these claims and cannot show that his waiver of post-conviction rights results in a miscarriage of justice. Moreover, Defendant's plea agreement and plea colloquy clearly show that Defendant was in fact guilty, benefited from the terms of his plea agreement, and knowingly and voluntarily waived his appellate rights, including his right to collaterally attack his sentence. Accordingly, Defendant has waived his right to collateral review of his sentence, and his Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 should be summarily dismissed.

B. The Court Should Stay Resolution of the Motion until the Supreme Court Decides *United States v. Beckles*

The United States moves for a stay of these proceedings because, on June 27, 2016, the Supreme Court granted the petition for writ of certiori in *Beckles v. United States* (S. Ct. No. 15-8544) to decide: (1) whether the holding in *Johnson* applies to the residual clause of USSG § 4B1.2; and (2) if so, whether *Johnson* applies retroactively to Sentencing Guidelines cases on collateral review in which the sentence was enhanced by the residual clause in § 4B1.2. The

Defendant's pending motion seeks relief based on *Johnson*. Specifically, the Defendant argues that *Johnson* applies retroactively to Sentencing Guidelines cases on collateral review and his prior conviction for conspiracy to escape from jail no longer qualifies as a crime of violence under the Guidelines. Because the decision in *Beckles* will determine whether the Defendant may seek relief in this proceeding based on *Johnson*, the United States moves for a stay of these proceedings until the Supreme Court resolves the question. *See United States v. Rollins*, No. 15-1459 (10th Cir. July 5, 2016) (abating appeal until the Supreme Court's decision in B*eckles*).

In so requesting, the United States is mindful that the Defendant will suffer no prejudice should the Court issue the stay. Even if this Court were to rule in favor of the Defendant today – that is, if the Court found that *Johnson* applies retroactively to Guideline cases and that his prior convictions no longer qualify as predicate career-offender offenses, his adjusted offense level would be 21. That, combined with his criminal history category of VI, results in an advisory guideline range of 77 to 96 months. Therefore, even if the Defendant received the low end of the newly-calculated guideline range, he would not be released from custody prior to the expected decision in *Beckles*. Thus, the United States respectfully requests that the Court stay resolution of this matter pending that decision. The Defendant objects to the request for a stay.

C. ***Johnson*** **Does Not Apply Retroactively To This Case Because The Sentence Was Determined Under The United States Sentencing Guidelines And The Case Was Final Before The Decision In** ***Johnson*** **Was Announced.**

The ACCA enhances sentences for persons convicted of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g) if they previously have been convicted of a serious drug offense or a violent felony. *See Johnson*, 135 S. Ct. at 2555. ACCA "violent felonies" are defined under 18 U.S.C. § 924(e)(2)(B) to include "any crime punishable by imprisonment for a term exceeding one year" that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or **otherwise involves conduct that presents a serious potential risk of physical injury to another**. The bolded part, also known as the "residual clause" was held to be unconstitutionally vague in *Johnson*. *See* 135 S. Ct. at 2557. In so doing, the Supreme Court invalidated enhanced sentences under the ACCA which were based on the residual clause. *Id*. at 2563.

The new rule of constitutional law announced in *Johnson* is retroactive in *all* ACCA cases – those pending on direct review as of the date *Johnson* was decided, see *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), as well as those that were final before that date that are challenged on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016) (holding that *Johnson* decision invalidating the residual clause of the ACCA was a substantive rule that applied retroactively on collateral review).

This case, by contrast, involves a collateral attack challenging the use of the residual clause in the Sentencing Guidelines' definition of a "crime of violence" to enhance a guidelines sentencing range under USSG § 2k2.1(a)(2). The retroactive character of *Johnson* in ACCA cases on collateral review does not govern the separate question of whether *Johnson* applies retroactively to the Sentencing Guidelines. While the application of *Johnson* to the ACCA is a substantive change in the law because it necessarily alters the statutory range of permissible sentences, the application of *Johnson* to the Sentencing Guidelines' residual clause produces procedural changes in the sentencing process that are not retroactive on collateral review.

Although *Johnson*'s holding that the ACCA's residual clause is invalid applies to the identically worded residual clause in USSG § 2k2.1(a)(2) in cases that are not yet final, *see*, *e.g.*, *United States v. Madrid*, 805 F.3d 1204, 1211 (10th Cir. 2015) (holding that USSG § 4B1.2 residual clause is unconstitutionally vague), different – and more restrictive – retroactivity principles govern when a defendant seeks to undo a final judgment on the basis of an intervening decision. *See generally Teague* *v. Lane*, 489 U.S. 288 (1989) (plurality opinion). Under *Teague* and its progeny, courts generally refuse to apply (or announce) new rules of criminal procedure for the first time in cases on collateral review. *Id*. at 311.

In sum, *Johnson* applies retroactively in all ACCA cases and in guidelines cases on direct review, but it does not apply retroactively in sentencing guidelines cases such as this one that were final before the decision in *Johnson* was announced.

a. New Substantive Rules Apply Retroactively On Collateral Review, But New Procedural Rules Almost Invariably Do Not.

Under the Supreme Court's retroactivity analysis, new rules of criminal procedure do not apply retroactively to cases that became final before the decisions announcing those rules were issued. *Teague*, 489 U.S. at 310; *see also Stringer v. Black*, 503 U.S. 222, 228 (1992) (referring to the "interests in finality, predictability, and comity underlying our new rule jurisprudence"). The *Teague* defense "is not 'jurisdictional' in the sense that [federal courts] * * * must raise and decide the issue *sua sponte*," *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), but where (as here) the government asserts a *Teague* defense, "the court *must* apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (emphasis in original).

b. The Rule That Johnson Extends To The Sentencing Guidelines Would Represent A New, Non-Watershed Rule Of Procedure Which Is Not Retroactive.

The ruling that *Johnson* renders the residual clause in the guidelines unconstitutionally vague depends on the announcement of new non-watershed rules of criminal procedure. Accordingly, *Teague* bars the Court from announcing those rules and from granting defendant collateral relief from his guidelines sentence.

i. The Rule Extending Johnson To The Federal Sentencing Guidelines Would Be "New."

No prior precedent dictated the conclusion that the guidelines' residual clause is unconstitutionally vague. To the contrary, the Supreme Court had twice rejected the argument that the identically worded residual clause in the ACCA was vague when that argument was pressed in dissenting opinions. *See James v. United States*, 550 U.S. 192, 210 n.6 (2007); *Sykes v. United States*, 131 S. Ct. 2267, 2277 (2010). To conclude as it did, *Johnson* had to "overrule[] * * * [the] contrary holdings in *James* and *Sykes*," 135 S. Ct. at 2563, and "there can be no dispute that a decision announces a new rule it if expressly overrules a prior decision." *Graham v. Collins*, 506 U.S. 461, 467 (1993); accord *Saffle*, 494 U.S. at 488.

The conclusion that *Johnson* announced a new rule is particularly clear in this case, where this Court may grant relief only by extending *Johnson*'s holding to the guidelines. *Johnson* voided the ACCA's residual clause for vagueness, and in doing so, abandoned the Court's previous efforts to narrow the scope of that clause through judicial construction. 135 S. Ct. at 2556-2560, 2563. Yet *Johnson* nowhere mentioned the Sentencing Guidelines, even though the guidelines contain an identically-worded residual clause in § 4B1.2, and even though the government's supplemental brief in *Johnson* referred to § 4B1.2's commentary in arguing that possession of a sawed-off shotgun poses an inherent risk of violence. *See* U.S. Supp. Br. 10, *Johnson v. United States*, No. 13-7120 (filed Mar. 20, 2015). The rule that the guideline's residual clause is unconstitutionally vague in light of *Johnson* is therefore a "new" rule.

ii. The Rule Extending *Johnson* To The Federal Sentencing Guidelines Is "Procedural."

Applying *Johnson* to the USSG § 2k2.1(a)(2) residual clause also would be a procedural rule subject to *Teague*. The effect of *Johnson* in the Guidelines context stands in contrast to the effect of *Johnson* under the ACCA. Under the ACCA, when a court relied on the residual clause to find that the defendant had the necessary three prior convictions, the defendant's sentence was elevated from a maximum of ten years to a *minimum* of 15 years. *Compare* 18 U.S.C. § 924(a)(2) with 18 U.S.C. § 924(e)(1). As the Supreme Court explained in *Welch*, *Johnson* "changed the substantive reach of the Armed Career Criminal Act, altering the range of conduct or the class of persons that the [Act] punishes." *Welch*, 136 S. Ct. at 1265. *Johnson* changed the class of persons who can be convicted under the Act and altered the statutory penalties: "Before *Johnson*, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison." *Id*. In contrast, after *Johnson* "the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison." *Id*. Thus, the constitutional rule announced in *Johnson* renders the 15-year minimum prison sentence illegal in cases where it was based on the residual clause, and that change is substantive because it alters the permissible ranges of sentences and the class of individuals subject to the ACCA. *See Welch*, 136 S. Ct. at 1265 ("*Johnson* affected the reach of the [ACCA] . . . [and] is thus a substantive decision").

Misapplications of the Sentencing Guidelines, in contrast, do not have the same consequences and are not retroactive to cases on collateral review. The rule invalidating the crime-of-violence residual clause establishes that the defendant's guidelines range was incorrectly calculated, but it would not disturb the statutory boundaries for sentencing set by Congress for the crime or change the class of individuals subject to prosecution for the offense. The guidelines do not trigger a statutory mandatory minimum sentence that would not otherwise apply and do not elevate the statutory maximum, as is true under the ACCA. See *Mistretta v. United States*, 488 U.S. 361, 396 (1989) (Sentencing Guidelines do not usurp "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead operate "within the broad limits established by Congress"). Indeed, guidelines sentences always must be within the statutory limits set by Congress; as a result, a guidelines sentence imposed on the basis of an incorrect guidelines range may be erroneous, but it is not illegal or unlawful as in a case involving prejudicial *Johnson* error under the ACCA. See *Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011) (en banc) (explaining that "Sun Bear's 360-month [guidelines] sentence," imposed on the basis of an error in classifying him as a mandatory career offender, "is not unlawful" because "[a]n unlawful or illegal sentence is one imposed without, or in excess of, statutory authority").

An error in calculating the guidelines range, therefore, does not alter the statutory sentencing range or prevent re-imposition of the same sentence without the crime of violence enhancement, as would be true with prejudicial *Johnson* error in the ACCA setting. To illustrate, the defendant in this case faced a statutory sentencing maximum sentence of 20 years of imprisonment for his offenses, *see* 18 U.S.C. § 922(g)(1) and 924(a)(2), and his 120-month sentence was well within that statutory parameter.

In cases describing appellate review under *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court has characterized errors in calculating a defendant's advisory guidelines range as "procedural," rather than substantive. See, *e.g.*, *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013) ("Failing to calculate the correct [advisory] Guidelines range constitutes procedural error.") (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). That reflects the role of the Guidelines in the sentencing process: they are a step in imposing sentence, not a statutory direction on the range of available sentences. And although the meaning of "substance" and "procedure" can vary based on context, *see Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988), the Seventh Circuit Court of Appeals has relied on *Peugh*'s reference to "procedural error" to conclude that new rules affecting the calculation of a defendant's advisory guidelines range are procedural and thus not retroactive on collateral review. See *Hawkins II v. United States*, 724 F.3d 915, 917-918 (7th Cir. 2013) (supplemental opinion on denial of rehearing) (suggesting that because the Supreme Court described use of the incorrect guideline range as "procedural error," the Ex Post Facto holding in *Peugh* would not be applied retroactively on collateral review), cert. denied, 134 S. Ct. 1280 (2014); see also *Herrera-Gomez v. United States*, 755 F.3d 142, 146-147 (2d Cir. 2014) (holding that *Peugh* announced a new, non-watershed procedural rule that could not support a second-or-successive Section 2255 motion).

Before *United States v. Booker, supra*, sentencing courts had the authority to "depart" from the guidelines range in appropriate cases. *See* USSG § 5K2.0; *see also Koon v. United States*, 518 U.S. 81, 92 (1996); *Williams v. United States*, 503 U.S. 193, 205 (1992) ("The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court."). After *Booker*, sentencing courts have broader authority to "vary" from the now-advisory guidelines range. *See, e.g., Spencer v. United States*, 773 F.3d 1132, 1142 (11th Cir. 2014) (en banc) (stating that "sentencing courts depart or vary from the guideline range more often when they sentence career offenders"). That judicial authority to impose lesser sentences than called for by the guidelines illustrates that an erroneous sentencing enhancement is a procedural step in a multi-step process that results in a court's selection of a sentence, not a substantive rule that expands or contracts the statutory range of outcomes. As Judge Posner explained in *Hawkins II*, "[p]ostconviction review is therefore proper when for example the judge imposes a sentence that he had no authority to impose . . . since the consequence for the defendant in such a case is 'actual prejudice'—an 'injurious effect' on the judgment, [b]ut it doesn't follow that postconviction relief is proper just because the judge, though he could lawfully have imposed the sentence that he did impose, might have imposed a lighter sentence had he calculated the applicable guidelines sentencing range correctly." *Hawkins*, 724 F.3d at 917; *see also Hawkins I v. United States*, 706 F.3d 820, 823-824 (7th Cir. 2013) (holding that erroneous classification of defendant as career offender based on prior "walkaway" escape convictions, which were no longer crimes of violence, could not be corrected in a post- conviction proceeding); *but see In re Hubbard*, -- F.3d --, 2016 WL 3181417 at *7 (4th Cir. June 8, 2016) (describing the rule in *Johnson* as "substantive with respect to its application to the Sentencing Guidelines" in order authorizing second or successive habeas petition).

Accordingly, *Johnson*'s application to the guidelines constitutes a procedural rule, not a substantive decision entitled to retroactive application in guidelines cases on collateral review.

iii. The Rule Extending *Johnson* to the Federal Sentencing Guidelines Is Not "Watershed."

The new procedural rule resulting from the extension of *Johnson*'s holding to the guidelines' residual clause is not "watershed." An error in calculating a defendant's guidelines *range* does not necessarily render the sentence unfair or unreliable in the way that a complete deprivation of the right to counsel renders a trial conducted without counsel unfair and unreliable. See, *e.g.*, *United States v. Cronic*, 466 U.S. 648, 659 (1984) (complete denial of counsel at a critical stage renders the trial "unfair," and the "adversary process itself presumptively unreliable"). There will be many cases where the sentencing court's reliance on the residual clause did not affect the sentence (*i.e.*, cases where the court indicates that it would have imposed the same sentence regardless of the range, or where the defendant has other qualifying prior convictions).

Johnson in any event does not alter the bedrock procedural elements essential to the fairness of a sentencing proceeding. *Johnson* did not recognize, for the first time, that the due process clause prohibits vague penal laws; rather, it merely extended that well-recognized constitutional principle, *see, e.g.*, *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939), to hold a particular statutory enhancement unconstitutionally vague. *Johnson*, 135 S. Ct. at 2577. But new rules that merely apply a pre-existing legal principle in a new context do not "effect a sea change in criminal procedure comparable to that wrought by *Gideon*." *Panetti v. Stephens*, 727 F.3d 398, 414 (5th Cir. 2013).

Neither *United States v. Booker*, 543 U.S. 220 (2005), nor *Alleyne v. United States*, 133 S. Ct. 2151 (2013), have been deemed retroactive. *Conrad v. United States*, 815 F.3d 324, 326 (7th Cir. 2016). If procedural rules such as *Booker*, which profoundly altered the landscape of federal sentencing, and *Alleyne*, which required that facts triggering mandatory minimum sentences must be proven to the jury beyond a reasonable doubt, are not retroactive "watershed" procedural rules, then there is no argument to be made that the invalidation of the residual clause as applied to the guidelines is a watershed procedural rule. *Conrad*, 815 F.3d at 326. This Court should deny Defendant's motion because, under *Teague*, the extension of *Johnson* to the guidelines is not a new "watershed" procedural rule. Consequently, Defendant is not entitled to relief.

III. Conclusion

Defendant waived his right to collaterally attack his sentence in his plea agreement. If the Court opts not to enforce the waiver, it should stay resolution of this matter pending resolution of *Beckles*. In the alternative, the Court should find that the Supreme Court's holding in *Johnson* does not apply retroactively to non-ACCA cases on collateral review. Wherefore, for the reasons set out above, the United States hereby requests that the Court dismiss Defendant's Motion to Correct Sentence pursuant to 28 U.S.C. § 2255.

Respectfully submitted,

DAMON P. MARTINEZ
United States Attorney

Electronically Filed 11/20/16

JACK E. BURKHEAD
Assistant U.S. Attorney
201 Third St.
Albuquerque, NM 87102
575-522-2304

I HEREBY CERTIFY that I electronically
filed the foregoing with the Clerk of the
Court using the CM/ECF system which
will send electronic notification to defense counsel of record

Electronically Filed 9/19/16
JACK E. BURKHEAD
Assistant U.S. Attorney